FOR ARGUMENT

No. 78-776

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA,

Petitioner,

vs.

MILTON DEAN BATCHELDER,

Respondent.

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

QUESTIONS PRESENTED

1. Where 18 U.S.C. §922(h) and §1202(a) are vague and inconsistent in that they provide a different punishment for the same offense and thereby raise a serious doubt of constitutionality of tha statutes, may the court apply the rule of lenity?

2. Whether U.S.C. §922(h) and §1202(a) are void for vagueness under the Fifth Amendment and violate the due process and equal protection of the law for permitting the prosecution to choose whether to charge the Respondent under Section 1202(a) calling for a more severe sentence?

3. Whether §1202(a) is an implied repeal of §922(h)?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

* * *

3. 18 U.S.C. 922(h) provides:

> It shall be unlawful for any person—
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> (2) who is a fugitive from justice;
>
> (3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or
>
> (4) who has been adjudicated as a mental defective or who has been committed to any mental institution;
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

4. 18 U.S.C. 924(a) provides in pertinent part:

> Whoever violates any provision of this chapter * * * shall be fined not more than $5,000, or imprisoned not more than five years, or both, * * *.

5. 18 U.S.C. App. 1202(a) provides:

> Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or
>
> (2) has been discharged from the Armed Forces under dishonorable conditions, or

> (3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or
>
> (4) having been a citizen of the United States has renounced his citizenship, or
>
> (5) being an alien is illegally or unlawfully in the United States,
>
> and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

SUMMARY OF ARGUMENT

Sections 922(h) and 1202(a) providing for different punishments for the same offense are void for vagueness under the Fifth Amendment. The Court of Appeals tried to avoid holding both sections unconstitutional and gave a constitutioned reading to the ambiguity by requiring that the Respondent be sentenced to a lessor sentence under Section 1202(a). Also the unfettered discretion by the prosecutor to choose to try the Respondent under Section 922(h) which carries a greater punishment violates the Respondent's right to due process and equal protection of the law. The government argues that it is within its discretion to select one or more charges from the federal criminal offenses. This is not the issue. A single act may violate one or more statutes, each requiring different element of proof. In the instant case the offense requires identical proof and subjects the offender to two different penalties.

Senator Long's amendment to the Omnibus Crime Control and Safe Acts was intended to replace Section 922(h). Section 1202(a) is directed to a larger group considered dangerous. From the meager discussion at the time the amendment was offered, we submit that Senator Long intended to replace 922(h) by 1202(a).

I.

18 U.S.C. SECTION 922(h) AND SECTION 1202 ARE VAGUE AND INCONSISTENT IN THAT THEY PROVIDE A DIFFERENT PUNISHMENT FOR THE SAME OFFENSE AND THEREBY RAISE A SERIOUS DOUBT OF CONSTITUTIONALITY OF THE STATUTES, THE COURT MAY APPLY THE RULE OF LENITY.

Respondent was convicted for violation of Title 18, United States Code, §922(h), for receiving a firearm which had previously been shipped in interstate commerce, defendant having been convicted of a crime punishable by imprisonment for a term exceeding one year.

Section 922(h)(1) proscribes the "receipt" of a firearm by "any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year. . . ." The maximum penalty for a violation of §922(h) is incarceration for a period of five years and/or the imposition of a fine of $5,000. (18 U.S.C. §924(a)).

Similarly, Title 18, United States Code, §1202(a) also proscribes the "receipt" of a firearm by "any person who has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony. . . ." Section 1202(a) provides that a violation of the section carries with it a maximum sentence of incarceration of two years and/or a fine of $10,000.

The Court of Appeals found that both sections under consideration presented serious questions of the constitutionality of the statutes. The Court of Appeals enunciated their principles: (1) the principle of lenity; (2) the principle that a later enacted statute can under circumstances serve as an implied repeal of an earlier statute; and (3) that when a serious doubt of constitutionality is raised a court will first ascertain whether a construction of the statute is fairly possible by which the question can be avoided. The Court of Appeals applied the rule of lenity.

The Court said:

> "Because we therefore find the reasoning of other circuits cited by the Government to be inapplicable, we decline to follow those cases here and are left with serious doubts about the constitutionality of two statutes that provide different penalties for identical conduct. Fortunately we need not reach a final conclusion on these difficult constitutional questions because, having found a possible ambiguity when the Omnibus Act is read as a whole, we can give the Act a clearly constitutional reading by requiring that defendant's sentencing be governed by Section 1202(a)."

Much of the government's brief relates to explaining to this court that the Court of Appeals was in error in the case because there was no ambiguity in the statutes. The government argues that the word "five" in §922(h) is not ambiguous and how could it be construed to mean "two". But this is not the case here. The government strains its reasoning and misses the point of this case. We do not contend that the words contained in each section have an ambiguous meaning. The crux of the case is not whether the words "five" or "two" by themselves are ambiguous, but rather that the sections in the Act which provide for two different penalties for the same offense are void for vagueness under the Fifth Amendment.

The overlap of several sections of the federal gun control laws has been recognized and clarified by recent decisions of the Supreme Court. In *United States* v. *Bass*, 404 U.S. 336 (1971), the court recognized that there is some overlap between Title IV, of which §922(h) is a part, and

Title VII, of which §1202(a) is a part, of the Omnibus Crime Control and Safe Streets Act of 1968. 404 U.S. at 342-343. *See also United States* v. *Craven,* 478 F. 2d 1329, 1336, n. 5 (6th Cir.), cert. denied, 414 U.S. 866 (1973).

It is submitted that under the particular circumstances of the instant cause, wherein the conduct of the Respondent is proscribed by the two aforementioned felony statutes, both statutes may be void for vagueness under the Fifth Amendment.

In *Berra* v. *United States,* 351 U.S. 131, 135 (1956) Justice Black in his dissenting opinion said:

> "The Government's contention here also challenges our concept that all people must be treated alike under the law. This principle means that no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same."

In permitting Sections 922(h) and 1202(a)(1) to coexist, Congress has abdicated this function and has left to the United States Attorney a free choice, without any standards or criteria to govern his discretion, as to whether a person previously convicted of a felony and in receipt of a firearm should be indicted under a statute carrying a maximum sentence of two years or under one carrying a maximum sentence of five years. Not surprisingly, the United States Attorney has chosen to indict the Respondent under the statute accompanied by the higher maximum sentence. Respondent respectfully submits that this unfettered discretion resulting from the coexistence of these two overlapping statutes violates the principle of separation of powers and that the instant indictment under §922(h) violates Respondent's right to due process and equal protection of the law because he is being subjected to a higher possible penalty for the same conduct as a person charged under §1202(a)(1) for no rational reason.

The Government agrees that both §922 and §1202 proscribe identical conduct as they relate to possession of firearms by felons. The government argues that it has discretion to proceed under either statute, absent a showing of an abuse of that discretion. The Government also argues that it is within its discretion to proceed to charge a felony, a lesser offense or not to charge at all and that if it does decide to charge, it may select one or more charges from the federal criminal statutes, since one act may violate several statutes.

The issue in the present case is not the same. A single act may violate one or more statutes, each requiring different elements of proof, *Blockburger* v. *United States,* 284 U.S. 299, 304 (1932); and that in some instances the commission of one crime merges into another committed by the same act and separate sentences cannot be imposed. *Heflin* v. *United States,* 365 U.S. 415 (1959); *Milanovich* v. *United States,* 365 U.S. 551 (1961); *United States* v. *Gaddis,* 424 U.S. 544 (1976); *United States* v. *Seals,* 545 F. 2d 26 (7th Cir., 1976).

In the instant case the offense requires identical proof and subjects the offender to two different penalties. The problem is further compounded by the fact that both statutes are contained in separate titles of the *same Act.*

The Court of Appeals in the instant case said:

> "It is our conclusion that at best Congress would have no more power to delegate the selection of punishment to the Attorney General than it does to the courts or to administrative agencies. Because this statutory scheme, if interpreted to give meaning both to Section 922 and 1202, would affix two separate and inconsistent punishments rather than one scheme of punishment (compare *United States* v. *Evans,* 333 U.S. 483), we have serious doubts about the constitutionality of that construction. See *Berra* v. *United States,* 351 U.S. 131, 139-140 (Black, J. dissenting).

Justice Black stated at pages 139-140:

> A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. The basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney or the Attorney General.
>
> • • •
>
> The Government's contention here also challenges our concept that all people must be treated alike under the law. This principle means that no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same. It is true that there may be differences due to different appraisals given the circumstances of different cases by different judges and juries. But in these cases the discretion in regard to conviction and punishment for crime is exercised by the judge and jury in their constitutional capacities in the administration of justice.

Batchelder was prosecuted under 18 U.S.C. §922(h) for precisely the same conduct which would have supported a conviction under 18 U.S.C. §1202. Batchelder's prosecution under 18 U.S.C. §922(h) violated his rights to due process of law, as he was the victim of discriminatory conduct by the Government. The Government's unfettered discretion to determine under which statute to prosecute violated both his rights to due process of law, and equal protection of the laws. *Berra* v. *United States,* 351 U.S. 131 (1956) (BLACK, J., dissenting).

II.

18 U.S.C. SECTION 922(h) AND SECTION 1202(a) ARE UNCONSTITUTIONAL FOR BEING VAGUE AND AMBIGUOUS UNDER THE FIFTH AMENDMENT AND VIOLATE THE DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

The Court of Appeals expressed a serious doubt of the constitutionality of both sections because of vagueness under the Fifth Amendment, and a violation of the protection under due process and equal protection of the law. (See argument under point I). There are serious doubts of the constitutionality of the two statutes. To permit these statutes to remain in their present form will bring to the courts new problems of construction. The vagueness and ambiguity arising from the two sections covering different punishments for the same offense requires that they be held unconstitutional.

III.

SECTION 922(h) WAS REPEALED BY SECTION 1202(a).

It is our position that Senator Long intended that his last minute Amendment was to replace §922(h). After the Omnibus Crime Control and Safe Streets Act of 1968 was passed Section 1202 was a last minute amendment. See generally *Stevens* v. *United States,* 440 F. 2d 144 (6th Cir. 1971). After the Act had passed the House and had been reported to the Senate by the Senate Committee on the Judiciary, on the day the Senate version of the Act passed the Senate, Section 1202 was offered from the floor as an amendment by Senator Long. 114 Congressional Record 14775. No specific mention was made of Section 922. Senator Dodd asked whether Senator Long's amendment was

a substitute for Title IV and Senator Long replied "This amendment would take nothing from the bill . . ." In explaining Senator Long's amendment to the House, Congressman Machen said that "this provision is necessary to a coordinated attack on crime and also [is] a good complement to the gun control legislation contained in Title IV." The Court of Appeals in its discussion of the passage of the bill said:

> "This brief legislative history leaves a perplexing problem of statutory construction. While it could be argued that the legislators' comments indicate that Congress intended the two titles to coexist, it is hard to imagine, and nothing in the history suggests, that the legislators if they were focusing upon these Sections could have considered Section 1202 a "good complement" to Section 922."

Title IV concerns itself with four categories: (1) persons under indictment or having been convicted of a crime punishable by imprisonment for a term exceeding one year; (2) fugitives from justice; (3) addicts and unlawful users of various controlled substances; and (4) mentally incompetents. Section 1202(a) directs itself to five categories: (1) convicted felons; (2) persons dishonorably discharged from the Armed Services; (3) persons who have renounced their American citizenship; and (4) illegal aliens. Section 1202(a) imposed a disability on three groups that are not covered by Section 922(h).

It is our position that Senator Long considered his amendment broader and more effective than that contained in 922(h) and that it would be a substitute for 922(h). A later enacted statute can under certain circumstances serve as an implied repeal of an earlier statute. We recognize that implied repeals are disfavored but we submit that Senator Long's brief statement when he offered the amendment was intended to indicate that he intended to replace 922(h) by 1202(a).

CONCLUSION

The judgment of the Court of Appeals should be affirmed or in the alternative that the Sections 922(h) and 1202(a) be declared unconstitutional or that this court hold that Section 922(h) is repeated by Section 1202(a).

Respectfully submitted,

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